



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

**COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA**

Appellant

and

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STEVEN BENDEL

First Respondent

GLEEWIN INVESTMENTS PTY LTD (ACN 131 785 576)

Second Respondent

RESPONDENTS' SUPPLEMENTARY SUBMISSIONS

PART I: CERTIFICATION

- 20 1. These submissions are in a form suitable for publication on the internet.

PART II: SUPPLEMENTARY SUBMISSIONS

Overview

2. These submissions respond to the questions set out in the Appellant's Supplementary Submissions filed 28 October 2025 (**AS2**) at [2];¹ broadly:
- (a) whether separate trusts were created in respect of the amounts of income set aside by Gleewin for Gleewin Investments;
 - (b) whether there was a debtor-creditor relationship between Gleewin and Gleewin Investments,

¹ These submissions adopt the terms defined in the Appellant's Submissions filed 31 July 2025 (**AS1**), the Respondents' Submissions filed 28 August 2025 (**RS1**) and AS2.

(together, the **supplementary questions**); and

(c) whether the answers to the supplementary questions alter the answer to the question ultimately raised by the Commissioner's appeal (see RS1 [2]).

3. Although the supplementary questions are relevant to characterising the 'taxable facts' to which Division 7A applies, the supplementary questions do not alter the answer to the ultimate statutory question.

4. Regardless of whether separate trusts were created, and regardless of whether there was a debtor-creditor relationship, Gleewin Investments did not make 'loans', as defined by s 109D(3), to Gleewin that were not fully repaid before the lodgment day for each relevant income year.

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5. Before turning to the supplementary questions, we address two revisions to the Commissioner's case in AS2.

Commissioner's revised case

Distribution of income

6. First, the Commissioner now contends that '[i]t is not the case that [Gleewin] had resolved only to set aside, but not to distribute, the relevant income' (AS2 [7]). By this, he appears to submit that Gleewin in fact resolved to 'pay' or 'apply' the income to Gleewin Investments (AS2 [32]). To the extent that the Commissioner now argues that Gleewin resolved to do something more than 'set aside' the income (such as pay or apply it), that argument should be rejected.

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7. In the relevant resolutions (TR, Annexure B (CAB, pp 70-77)), Gleewin resolved to 'set aside' the income of the 2005 Trust for Gleewin Investments and Mr Bendel in the proportions specified. The heading 'Distribution of Income' and the phrase 'distributed as specified above' in the resolutions use 'distribute' in a colloquial sense² to refer to the setting aside of classes or categories of income, being what Gleewin specifically resolved to do in the text under that heading.³

² As was used by the Tribunal (TR [6] fn 8) and the Full Court (FC [7]) in the present case.

³ The amounts set aside were later placed to the credit of the beneficiaries in the 2005 Trust's accounts in accordance with the Trust Deed (cll 1(19), 3(2)(c) (RBFM, pp 12, 15)).

8. Gleewin did not resolve to make a ‘distribution’ in any sense beyond setting aside the relevant income for Gleewin Investments and Mr Bendel in the specified manner with the consequences set out in the Trust Deed (particularly, cll 3(5) and 6(5) (RBFM, pp 17-18, 21-22)).
9. In particular, Gleewin did not resolve to pay any income to Gleewin Investments. Gleewin did not have any obligation to pay the income until Gleewin Investments exercised its right⁴ to call for payment (cl 3(5)). Until that time, there was no amount due for payment (RS1 [72]) and Gleewin was obliged to hold the income, with a power to invest that income, on behalf of Gleewin Investments (RS1 [63]).

10 *Financial accommodation*

10. Second, the Commissioner now contends that the financial accommodation provided by Gleewin Investments to Gleewin for the purposes of s 109D(3)(b) ‘is found in Gleewin Investments refraining from calling for payment or taking steps to require payment’ (AS2 [36]; see also [37], [41(c)]-[41(d)]).
11. The framing of this ‘provision of ... financial accommodation’ is broader than the Commissioner’s case to date. The revised contention:
 - (a) centres on *unilateral* (in)action by Gleewin Investments, and does not require any *bilateral* agreement, arrangement or transaction⁵ with Gleewin;⁶
 - (b) does not depend on whether and, if so, how Gleewin used the amounts set aside (in particular, is not limited to where Gleewin used the amounts for the ‘general purposes’ of the 2005 Trust);⁷ and
 - (c) does not depend on Gleewin Investments’ knowledge of whether and, if so, how Gleewin used those amounts.⁸

⁴ *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 118 [43], 119 [47].

⁵ The Commissioner maintains an alternative argument that there was a ‘transaction (whatever its terms or form) which in substance effects a loan of money’ (s 109D(3)(d)) (AS2 [38]-[39]). In addition to other reasons outlined in RS1, that argument must fail because, as the Commissioner now appears to accept, there was no bilateral activity that could amount to ‘a transaction’.

⁶ Cf AS1 [3], [31], [42], [45], [48]; Appellant’s **Reply** filed 17 September 2025 at [3], [15]; contra [2025] HCATrans 068 (**Transcript**) at pp 27 (lns 1143-1146), 71-72 (lns 3190-3199).

⁷ Cf AS1 [45], [47] (see also [3], [42], [48]); Reply [15].

⁸ Cf AS1 [3], [42], [45], [48]; Transcript at pp 2 (lns 22-23), 7-8 (lns 270-275), 18 (lns 771-772), 58 (lns 2584-2587), 59 (2609-2611), 62 (lns 2748-2753), 67 (lns 2966-2967), 68 (lns 3039-3041), 69 (lns 3083-3085), 71 (lns 3182-3186), 74 (lns 3311-3313).

12. On the Commissioner's revised contention, the 'provision of ... financial accommodation' within s 109D(3)(b) would extend to, for example, all cases of:
 - (a) a beneficiary of a bare trust (including, for example, under a custodial arrangement) merely not calling for transfer of the trust assets;
 - (b) a creditor merely not calling for payment of a debt as soon as the due date for payment passes; and
 - (c) a person merely not calling for possession of a chattel owned by that person.
13. For the reasons set out in RS1 (Part V), 'financial accommodation' within the meaning of s 109D(3)(b) is not as broad as the Commissioner contends.

10 ***Separate trusts***

Procedural history

14. In the Tribunal, it was common ground that once Gleewin set aside the amounts of income for Gleewin Investments:
 - (a) Gleewin did not separate those amounts (or any assets representing the income) from the other property of the 2005 Trust, nor recognise such a separation in the accounting records of the 2005 Trust (TR [41], [51]); but
 - (b) nonetheless, the Trust Deed (particularly, cl 3(5)) operated such that those amounts were held on a separate trust for Gleewin Investments.
15. However, the Tribunal found that no separate trust 'in fact arose in any conventional sense' (TR [80]); instead, what was created 'was a right or entitlement for [Gleewin Investments] coupled with the corresponding obligation of [Gleewin] of a nature contemplated by what Gageler J said in *Fischer* [(2016) 257 CLR 615 at 650-652 [96]-[100], [104]]' (TR [73], [79]).
16. In the Full Court, the Respondents made a forensic decision not to challenge that finding—despite it being open to doubt (RS1 [12] fn 6). The Commissioner did not challenge the finding either.
17. Although the creation (or not) of the separate trusts does not alter the answer to the question ultimately raised by the Commissioner's appeal, this Court should find that separate trusts were created on the following basis.

Intention to create separate trusts

18. An instrument governing a trust settlement may confer upon the trustee the power to appoint part of the subject matter of that trust for the benefit of a beneficiary or purpose such that the subject matter appointed is no longer subject to the original trust relationship but forms the subject of a separate trust relationship.⁹ The key consideration is the intention evinced by the terms of that instrument.¹⁰
19. Clause 3(5) of the Trust Deed is such a power. It evinces a clear intention to impress upon certain assets held by Gleewin a new trust relationship separate from the pre-existing and continuing 2005 Trust relationship. Under the new relationship, Gleewin continues to hold the legal title to the subject matter, but in a new capacity; as trustee of the separate trust (not the 2005 Trust).

Subject matter of the separate trusts

20. In the relevant resolutions, Gleewin resolved to set aside certain ‘classes or categories of income of the [2005 Trust]’ for Gleewin Investments and Mr Bendel in the proportions specified within the table set out in each resolution.
21. In this context, ‘income’ is a general trust law concept; it is the ‘income ascertained by the trustee according to appropriate accounting principles and the trust instrument’.¹¹ Here, the income was determined (CAB, pp 70, 72, 74, 76) primarily by reference to the accounting records maintained by Gleewin.¹²
22. Abstracted from the terms of the Trust Deed, the notion of a trust over such ‘income’ may pose conceptual challenges because income according to accounting concepts is not, itself, a subject matter of property capable of assignment at law or in equity. However, what Gleewin set aside at the end of each year was not merely income in that abstract sense.

⁹ *Roome v Edwards* [1982] AC 279 at 293F; *Bond (Inspector of Taxes) v Pickford* [1983] STC 517 at 522h-523c. See, eg, *Hart (Inspector of Taxes) v Briscoe* [1979] Ch 1 (where the relevant power authorised an application of the trust fund ‘freed and released from the trusts concerning the same’) and *Oswal v Federal Commissioner of Taxation* (2013) 233 FCR 110 at 121-127 [42]-[61].

¹⁰ See, eg, *Aussiegolfa Pty Ltd v Federal Commissioner of Taxation* (2018) 264 FCR 587 at 644 [206(f)], 647 [219].

¹¹ *Zeta Force Pty Ltd v Federal Commissioner of Taxation* (1998) 84 FCR 70 at 74, quoted in *Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 507 [45].

¹² The resolutions also partly determined the income by reference to each ‘capital gain’ made by Gleewin within the meaning of s 995-1(1) of the ITAA 1997, being a tax law concept.

23. Gleewin's power to set aside income (cl 3(1)(a)), and the consequences of its exercise (cll 3(5), 6(5)), have been introduced previously (RS1 [11], [63]).
24. The effect of the exercise of that power must be understood in light of Gleewin's power to determine the content of the income of the 2005 Trust. In addition to its general power as trustee,¹³ Gleewin had specific powers under the Trust Deed to:
- 10 (a) 'determine whether any real or personal property or any increase or decrease in amount number or value of any property or holdings of property or any receipt or payments from for or in connection with any real or personal property shall be treated as and credited or debited to capital or to income ...': cl 7(18) (RBFM, pp 28-29); and
- (b) 'treat as income or as capital any amount or amounts or property which [Gleewin] receives as beneficiary under any other trust instrument or out of any other trust fund ...': cl 7(19) (RBFM, p 29).
25. Gleewin exercised those powers in each of the relevant resolutions (under the heading 'Determination of Income'). It determined to treat the property represented by the income, after meeting expenses and outgoings, in the accounting records (and capital gains for tax purposes) as income for trust purposes. Gleewin then exercised its power to set aside that property in the resolutions (under the heading 'Distribution of Income').
- 20 26. By way of metaphor, Gleewin kept records of how much fruit its trees produced during the season. Gleewin's records identified that fruit as 'income'. At season end, Gleewin set aside (but did not deliver) its income for Gleewin Investments. In doing so, Gleewin did not merely set aside an abstract concept of 'income'; it set aside the property (the fruit) that it had determined was the income.
27. During the relevant years, Gleewin derived income from its assets in three forms: interest, trust entitlements and dividends (TR [39(e)]). Some, but not all, of the income was received as money;¹⁴ part of the trust entitlement and dividend income remained outstanding at year end (TR [39(f)]). All that property (whether money, debt or entitlement) was recorded in Gleewin's balance sheet as assets

¹³ *Clark v Inglis* (2010) 79 ATR 447 at 459 [53].

¹⁴ When we refer to Gleewin receiving 'money', we include a deposit into Gleewin's bank account.

(unless spent to meet expenses or invested in another asset, such as the loan to Mr Bendel) and in Gleewin's profit and loss statement as income.

28. The subject matter of the trusts created (by cl 3(5) operating together with the resolutions) was therefore the property held by Gleewin that was referable to the income recorded in the 2005 Trust's accounting records:

(a) to the extent that such income had not yet been received by Gleewin in money by year end (ie, unpaid trust entitlements or dividends), the subject matter was the debt or entitlement owing to the 2005 Trust in respect of that income (or a portion of that debt or entitlement);¹⁵ and

10 (b) to the extent that such income had been received by Gleewin in money by year end, the subject matter was:

(i) if the income remained in the form of money—that money (or the traceable portion of the total money held by Gleewin); or

(ii) if Gleewin had used that money during the year to acquire another asset—that other asset (or the traceable portion of that asset).

29. Therefore, the subject matter of the separate trusts, at the time of their creation, was multiple assets (or portions of those assets) held by Gleewin (formerly, as trustee of the 2005 Trust; now, as trustee of the separate trusts). Contrary to AS2 [19], Gleewin had identified the assets that were held on the separate trusts through the mechanism, provided by the Trust Deed, of determining the property that would be treated as 'income'.

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30. The fact that Gleewin did not separate the property representing the income from the property of the 2005 Trust, or otherwise recognise such a separation in its accounting records, cannot defeat the clear intention under the Trust Deed to create the separate trusts in respect of that income. There is no need for the money (or other assets) to be 'identifiably separated from the remaining trust assets'.¹⁶

¹⁵ As to trusts of part of a debt, see *White v Shortall* (2006) 68 NSWLR 650 at 697-698 [245]-[247]. See also *Associated Alloys Pty Limited v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 603 [28], 604 [31] (where the trust property was a proportion of proceeds); *Ward* [1970] NZLR 1 at 30 (lns 24-33) (where the trust property was part of moneys in a bank account and/or a solicitors' trust account).

¹⁶ *Ward* [1970] NZLR 1 at 30 (lns 24-27).

31. The mixing of the property of the separate trusts with the property of the 2005 Trust was authorised by the Trust Deed. Gleewin was empowered ‘to blend for the purposes of investment as [it] may from time to time decide any moneys which [Gleewin] holds upon the trusts herein declared with other moneys (whether or not such moneys are subject to any other settlement or trust)’ (cl 7(34) (RBFM, p 32)). Applying the metaphor above, Gleewin was not required to keep Gleewin Investments’ fruit separate from all other fruit held by Gleewin.
32. In this respect, the Commissioner’s reliance (at AS2 [17]) on Turner J in *Ward* is misplaced. First, Turner J was in dissent. Second, the facts that were critical for
10 Turner J do not exist in the present case. Turner J’s concern was that he could not identify the assets impressed with the new trust relationship because the amount of the income set aside for the beneficiaries (£3,540) exceeded the sum of the moneys held by the trustee in its bank account and a solicitors’ trust account (£3,285).¹⁷ However, Turner J said that, if there had been more than £3,540, it ‘might have been possible to say’ that £3,540 ‘out of the moneys so held in cash’ was impressed with a separate trust.¹⁸ There is no argument here that Gleewin did not hold sufficient assets to meet the income set aside for Gleewin Investments.
33. After the creation of the separate trusts, Gleewin, as trustee for the separate trusts, held, and invested, the property of those trusts on behalf of Gleewin Investments.
20 The form of the separate trust property thereafter changed (eg, the unpaid trust entitlements and dividends converted into money). But Gleewin’s obligations in respect of the property from time-to-time remained the same. Until Gleewin Investments called for payment, Gleewin was obliged to hold the property, with a power to invest that property, on behalf of Gleewin Investments (cll 3(5), 6(5)).
34. It was accordingly wrong for the Tribunal to conclude that there was ‘no identifiable property that was held for Gleewin Investments absolutely’ (TR[77]). If necessary, the property can be identified by equitable tracing.¹⁹ The tracing task

¹⁷ *Ward* [1970] NZLR 1 at 21 (ln 40) - 22 (ln 9); cf 30 (lns 33-36) (where McCarthy J expressed that it was ‘very doubtful whether the accounts in [that] case establish[ed] that there was insufficient cash’).

¹⁸ *Ward* [1970] NZLR 1 at 21 (ln 54) - 22 (ln 5).

¹⁹ *Foskett v McKeown* [2001] 1 AC 102 at 128D-F.

was not performed by the parties in the Tribunal because it was common ground that there were separate trusts.

35. In any event, it is unnecessary to undertake a tracing exercise here because the parties agree that ‘almost all’ of the amounts of income set aside for Gleewin Investments were lent by Gleewin to Mr Bendel.²⁰ During the relevant years, Gleewin used the subject matter of the separate trusts—or ‘almost all of it’—to acquire (in accordance with its powers (cll 6(5), 7(4))) a new asset, being the interest free loan to Mr Bendel, which was held on behalf of Gleewin Investments.
36. Alternatively, if no separate trusts were created at the time that the relevant resolutions were made (alternatively, at the end of the year in which the resolutions were made) because the subject matter was not then sufficiently certain, that is no reason to deny that a separate trust thereafter arose once the income set aside for Gleewin Investments was invested in an identifiable asset.²¹ On that basis, a separate trust arose when the income was loaned to Mr Bendel. At least by that time, the subject matter of the separate trust became clearly identifiable, being the loan receivable owed by Mr Bendel to Gleewin.

Application to the present case

37. The present case is within the circumstances described at AS2 [43],²² which the Commissioner accepts do not involve a loan. Although it is not entirely certain what the Commissioner means by property being ‘placed on a separate trust fund’, if he means that property is separated from other assets, that is immaterial. There can be a separate trust without such separation ([30]-[31] above). Any separation

²⁰ Transcript at p 3 (lns 84-88). The Tribunal did not expressly find that almost all of the amounts set aside were loaned to Mr Bendel. However, that is a necessary inference given, over the relevant years: (a) Gleewin did not make any new or additional material investments (TR [39(e)(i)]); (b) Gleewin’s liabilities substantially increased (compare \$9,393,601 on 30 June 2013 (ABFM, p 8) with \$13,426,953 on 30 June 2017 (ABFM, p 38)); (c) Gleewin made substantial loans to Mr Bendel in each relevant year (TR [37]); and (d) the only classes of Gleewin’s assets that grew during the relevant years were Gleewin current assets (particularly, unpaid trust entitlements) (compare \$1,275,000 on 30 June 2013 (ABFM, p 7) with \$3,523,244 on 30 June 2017 (ABFM, p 37)) and Mr Bendel’s ‘Beneficiaries Current Account’) (TR [43]).

²¹ Being another question that Turner J did not need to decide: *Ward* [1970] NZLR 1 at 22 (lns 13-21).

²² As the loan to Mr Bendel was interest free (TR [39(d)]), there is no question as to whether ‘any income derived from the investment of that separate trust fund [was] held for the sole benefit of Gleewin Investments’. In any event, any investments were on behalf of Gleewin Investments (cl 6(5)).

of the property would not alter the rights and obligations as between trustee and beneficiary.

38. If separate trusts were created, then Gleewin Investments did not make ‘loans’, as defined by s 109D(3), to Gleewin (as trustee for either the 2005 Trust or the separate trusts) that were not fully repaid before the relevant lodgment days. In addition to the reasons set out in RS1 (Part V), a beneficiary does not provide financial accommodation to the trustee by merely allowing property to continue being held on trust for its benefit.
- 10 39. Further, the Commissioner is wrong to suggest (at AS2 [41(c)]) that, if, after the creation of a separate trust, Gleewin Investments had called for its entitlement under that trust, Gleewin would have had to do something to arrange funds ‘as trustee of *the 2005 Trust*’. Rather, Gleewin would have had to meet that entitlement from the property of *the separate trust*. That property—or at least ‘almost all of it’ (see [35] above)—was the loan to Mr Bendel.
40. Alternatively, if separate trusts were not created, ‘what was created upon the passing of the resolutions to distribute Gleewin’s income was a right or entitlement for the beneficiary coupled with the corresponding obligation of the trustee of a nature contemplated by what Gageler J said in *Fischer*’ (AS2 [24]).
- 20 41. If so, then, for the reasons set out in RS1 (Part V), the result is the same; Gleewin Investments did not make ‘loans’, as defined by s 109D(3), to Gleewin (as trustee for the 2005 Trust) that were not fully repaid before the relevant lodgment days.

Debtor-creditor relationship

Procedural history

42. The Commissioner first alleged that there was a debtor-creditor relationship between Gleewin and Gleewin Investments in oral submissions in the Full Court.
43. In response, the Respondents submitted that, even if a debtor-creditor relationship emerged between those parties in the manner explained shortly, that did not affect the determination of the question raised by the Commissioner’s appeal.
- 30 44. In this respect, the Respondents accepted that, from the time that Gleewin recorded a liability (‘Beneficiaries Current Account’) of an amount owing to

Gleewin Investments in the 2005 Trust's financial accounts,²³ the pre-existing and continuing equitable relationship of trustee and beneficiary was, in respect of that amount, overlaid with a relationship of debtor and creditor in the sense that Gleewin Investment could (in addition to seeking equitable remedies) sue Gleewin for the recovery of that amount as money had and received.

45. The Respondents' position was founded on the statement of Gageler J (as his Honour then was) in *Fischer* (2016) 257 CLR 615 at 653 [105].²⁴ On that basis, the Respondents' position in the Full Court was that:

- 10 (a) any debtor-creditor relationship arose by reason of, and commenced from the time of, Gleewin's recording the liability to Gleewin Investments (and not some earlier event, such as resolving to set aside the income);²⁵ and
- (b) any debtor-creditor relationship was *overlaid* upon the pre-existing and continuing equitable relationship (rather than replacing, or altering the character of, the equitable relationship).

46. Notwithstanding that position, the Respondents did not accept:

- (a) that Gleewin Investments had exercised its right to call for payment of the income set aside (which Gleewin Investments did not do); nor
- 20 (b) that 'there remained nothing for [Gleewin] to execute except payment to Gleewin Investments' (cf FC [92]).²⁶ To the contrary, the Respondents' position was that, until Gleewin Investments called for payment, Gleewin was obliged to hold the income, with a power to invest that income on behalf of Gleewin Investments (ie, Gleewin was not a bare trustee).

47. The Respondents therefore agree with the Commissioner's position explained at AS2 [25]-[30]. However, the Respondents do not accept the Commissioner's

²³ TR [40(d)] (also [35]). See also the ABFM, pp 7, 11, 20, 29, 38.

²⁴ See also *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488 at 510 [68], 514-515 [77]. FC [92] refers to other passages in *Fischer*, which, albeit relevant, did not found the Respondents' position.

²⁵ No expert accounting evidence was led in *Fischer: Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [80].

²⁶ FC [92] reflects the Full Court's characterisation of the Respondents' position. These concluding words of FC [92] do not accurately reflect the Respondents' position below.

‘further basis’ set out at AS2 [31]-[34] because that incorrectly assumes that Gleewin resolved to ‘distribute’ (ie, pay or apply) the income (see [6]-[9] above).

48. For the reasons explained below, it is unnecessary for this Court to determine whether the parties’ understanding of this aspect of *Fischer* is correct. However, insofar as Court considers the issue, the Respondents, with the Commissioner,²⁷ accept that it should be decided based on the correct legal position.

Immateriality of any overlaid debtor-creditor relationship

- 10 49. The overlay of any debtor-creditor relationship upon the pre-existing and continuing equitable relationship of trustee and beneficiary is immaterial to the determination of the question ultimately raised in the Commissioner’s appeal.
50. To begin, any overlaid debtor-creditor relationship did not emerge because of any act by *Gleewin Investments* (see RS1 [33(a)], [71]). Such a relationship instead emerged via an admission by *Gleewin* in recording a liability owing to Gleewin Investments. Hence, if an overlaid debtor-creditor relationship emerged, that, as the Commissioner accepts (AS1 [31]), does not, by itself, indicate that Gleewin Investments ‘made’ a loan (ss 109D(1); 109D(4)), including by doing something described in s 109D(3) (s 109D(4)).
- 20 51. Further, the emergence of any overlaid debtor-creditor relationship did not alter the character of the pre-existing and continuing equitable relationship of trustee and beneficiary. The practical effect of the overlaid relationship is simply that the beneficiary can sue at law (for recovery of the amount as money had and received) in addition to seeking equitable remedies. But, as the Commissioner accepts (AS2 [26]), the trust (whether it be the 2005 Trust or a separate trust) did not ‘collapse’. Instead, the relationship between Gleewin and Gleewin Investments remained fundamentally a trust relationship, governed by the terms of the Trust Deed. The nature and scope of any overlaid debtor-creditor relationship was informed by, and subject to, those underlying terms.
- 30 52. Here, under the terms of the Trust Deed, Gleewin, even with an overlaid position as debtor, remained obliged, pending Gleewin Investments’ call for payment, to hold the income set aside, with a power to invest that income on behalf of Gleewin

²⁷ Transcript at p 34, lns 1483-1485.

Investments. There was no due date for payment. Gleewin Investments did not call for payment.²⁸ Gleewin did not pay.

53. For the same reasons as set out in RS1 (Part V), Gleewin Investments, by merely refraining from calling for payment, or taking steps to require payment, did not make ‘loans’, as defined by s 109D(3), to Gleewin that were not fully repaid before the lodgment day for each relevant income year.

Conclusion

54. For the reasons above, the determination of the supplementary questions does not alter the answer to the question ultimately raised by the Commissioner’s appeal.
- 10 55. The Commissioner should have considered whether Subdivision EA applies (to assess Mr Bendel) rather than relying on s 109D (to assess Gleewin Investments). The Tribunal correctly ordered the Commissioner to do so.

Dated: 11 November 2025



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²⁸ Cf *Chianti* (2007) 35 WAR 488 at 497-498 [31], 511 [70] (where a statutory demand was issued).